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No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

EUGENE F. DIAMOND, M.D. and
JASPER F. WILLIAMS, M.D.,
Appellants,

and

RICHARD M. DALEY, et al., and
NEIL F. HARTIGAN,
Appellants,

vs.

ALLAN G. CHARLES, M.D., et al.,
Appellees,

and

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,
Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the State of Illinois may require physicians who prescribe or administer abortifacients to inform their patients that they have done so, when the physician is given broad discretion in determining the manner in which that information is conveyed to the patient?

2. Whether a justiciable case or controversy was present in a facial challenge to Sections 6(1) and 6(4) of the Illinois Abortion Law, when the relevant statutory provisions had been amended and substantially altered?

3. Whether the Court of Appeals, if it did not err in addressing old §6(1), in light of the State's compelling interest in post-viable fetal life, nevertheless erred, in disregarding basic rules of statutory construction to strike

down a statute, capable of constitutional construction, that established a standard of care applicable to fetuses known to be viable?

4. Whether the State of Illinois can protect its strong interest in fetal life by requiring that the method of abortion be used that is most likely to preserve the life of the fetus, at that time in pregnancy when the fetus has a reasonable possibility of survival?

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Appellees.

On Appeal from the United States Court
of Apeals for the Seventh Circuit

JURISDICTIONAL STATEMENT

Appellants, Eugene F. Diamond, M.D., and Jasper F. Williams, M.D., together

with Appellant Neil F. Hartigan, Attorney General of the State of Illinois, appeal from the final judgment of the United States Court of Appeals for the Seventh Circuit, dated November 30, 1984, holding that Sections 2(10), 6(1), 6(4) and 11(d) of the Illinois Abortion Law unconstitutionally infringed upon a woman's fundamental right of priavacy as secured by the Fourteenth Amendment of the Constitution.*

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* In addition to the parties named in the caption, the following were also parties to the proceedings in the court below: Marvin Rosner, M.D., David Zbaraz, M.D., Martin Motew, M.D., Hector N. Zevallos, M.D., National Health Care Services of Peoria, Inc., Arthur C. Watson, M.D., and Robert C. Steptoe, M.D. All of these parties are appellees in this Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit permanently enjoining Sections 2(10), 6(1), 6(4) and 11(d) of the Illinois Abortion Law, which appears in the appendix attached hereto, App. 1-49, is reported at 749 F.2d 452 (7th Cir. 1984).

The opinion of the District Court for the Northern District of Illinois permanently enjoining sections 2(10), 6(4) and 11(d) of the Illinois Abortion Law is reported at 579 F.Supp. 464 (N.D. Ill. 1983).

The opinion of the District Court for the Northern District of Illinois issuing a preliminary injunction against certain sections of the Illinois Abortion Law on renewed motion for preliminary injunction is reported at 579 F.Supp. 377 (N.D. Ill. 1983).

The opinion of the Court of Appeals for the Seventh Circuit granting a preliminary injunction against certain sections of the Illinois Abortion Law, is reported at 627 F.2d 772 (7th Cir. 1980).

The opinion of the District Court for the Northern District of Illinois, issuing a preliminary injunction against certain sections of the Illinois Abortion Law, is not reported.

JURISDICTION

The final judgment of the Court of Appeals for the Seventh Circuit holding Sections 2(10), 6(1), 6(4) and 11(d) of the Illinois Abortion Law unconstitutional as violative of the Fourteenth Amendment of the Constitution was entered on November 30, 1984. Suit was brought pursuant to 42 U.S.C. §1983.

Notice of appeal to this Court was duly filed in the Court of Appeals for

the Seventh Circuit on February 28, 1985.

This appeal is being docketed within 90 days of the entry of final judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend XIV, §1

Ill. Rev. Stat. Ch. 38, ¶81-22(10) (1983)

Ill. Rev. Stat. Ch. 38, ¶81-26(1) (1983)

Ill. Rev. Stat. Ch. 38, ¶81-26(1) (1984 Supp.)

Ill. Rev. Stat. Ch. 38, ¶81-26(4) (1983)

Ill. Rev. Stat. Ch. 38, ¶81-26(4) (1984 Supp.)

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Ill. Rev. Stat. ch. 38, ¶81-22(9) (1983)

Ill. Rev. Stat. ch. 38, ¶81-22(6) (1984 Supp.)

Ill. Rev. Stat. ch. 38, ¶81-26(5) (1983)

The text of these provisions is set forth in the appendix to this jurisdictional statement.

STATEMENT OF THE CASE

(1) On October 30, 1979, the Illinois General Assembly passed S.B. 47, which contained amendments to the Illinois Abortion Law of 1975. S.B. 47 became law on November 20, 1979 upon a vote by two-thirds of the legislature to override a gubernatorial veto.

(2) On October 30, 1979, the same day as the passage of S.B. 47, Appellees filed a complaint in the United States District Court for the Northern District of Illinois seeking declaratory and injunctive relief against enforcement of the law by the Attorney General and the class of State's Attorneys represented by the State's Attorney for Cook County. Appellants Drs. Eugene F. Diamond and Jasper F. Williams were among those granted leave to intervene as defendants by the District Court.

(3) Plaintiffs are physicians and corporations who perform or provide abortions.

(4) In a Memorandum Opinion of November 16, 1979, then-District Judge Flaum upheld several provisions, including §2(10)'s definition of "abortifacient" and §11(d), which requires that anyone prescribing an abortifacient inform the patient that he or she is doing so. Both are at issue in this appeal. Several other sections of the law were preliminarily enjoined by the District Court, including the standard of care provisions of §§6(1) and 6(4), which were enjoined because they incorporated the term "viability" which was held to be invalid. Both of these sections are also at issue in this appeal.

(5) Plaintiffs appealed from the

District Court's decision refusing to enjoin §§2(10) and 11(d), among others, and the Court of Appeals issued a preliminary injunction against these two sections. Charles v. Carey, 627 F.2d 772 (7th Cir. 1980) (Charles I). Sections 6(1) and 6(4) were not appealed.

(6) Following the Seventh Circuit's decision, Plaintiffs filed a Renewed Motion for Preliminary Injunction against the remaining sections in the District Court. On July 14, 1983 District Judge Kocoras granted Plaintiffs' motion in part and denied it in part. However, none of the sections that are now on appeal was the subject of that ruling. Charles v. Carey, 579 F.Supp. 377 (N.D. Ill. 1983) (Charles II).

(7) Illinois House Bill 666, which amended the definition of "viability" in §2(2) and which substituted "sustained

survival" for the original language of "more than momentary survival" in §§6(1) and 6(4) was signed into law as Public Act 83-484 on September 17, 1983. It became effective immediately.

(8) On October 14, 1983, the District Court issued a Memorandum Opinion ruling on the parties' cross-motions for summary judgment, granting each in part. Judge Kocoras issued a permanent injunction against §§2(10), 6(4) and 11(d), but upheld §6(1) as amended by Public Act 83-484, and dissolved a preliminary injunction against it. Charles v. Carey, 579 F.Supp. 464 (N.D.Ill. 1983)(Charles III).

(9) On October 25, 1983, Intervening Defendants filed a timely motion pursuant to FRCP 59 to amend the October 14 judgment by dissolving the injunction against §6(4). In support of that

motion, Intervening Defendants filed on October 31 a Memorandum in Support of the Constitutionality of Section 6(4) of the Illinois Abortion Act of 1975 as amended by Public Act 83-484. On November 2, 1983, the District Court denied Intervening Defendants' motion in an unreported order.

(10) On December 2, 1983, Defendants Daley and Hartigan and Intervening Defendants timely filed separate motions of appeal from the final judgment, as amended on November 2, insofar as it permanently enjoined §§2(10), 6(4), and 11(d). On December 16, Plaintiffs cross-appealed from the District Court's refusal to issue a permanent injunction against §6(1). Briefs were subsequently filed in the Court of Appeals for the Seventh Circuit.

(11) On June 30, 1984, the Illinois

General Assembly enacted H.B. 1399, Public Act 83-1128, which amended the language of §§6(1) and 6(4), but not §§2(10) or 11(d). Subsequently, Intervening Defendants informed the Court of Appeals that the law had been amended to alter provisions that had been enjoined by the District Court and were then currently on appeal.

(12) Oral argument before the Seventh Circuit Court of Appeals was heard on September 19, 1984. At the close of oral argument, the Court acknowledged the amendments to §6(1) and §6(4), and directed the parties to file supplemental briefs addressing the issue of whether these amendments mooted the controversy with respect to these particular sections.

(13) On November 30, 1984, the Court of Appeals issued an opinion in

which it (a) held that the controversy concerning §6(1) and §6(4) was not moot and ruled upon the constitutionality of those sections as they stood repealed by Public Act 83-1128; (b) affirmed the District Court's permanent injunctions against §2(10), §6(4) and §11(d); (c) reversed the District Court's opinion with respect to §6(1); and (d) ordered that a permanent injunction be entered against §6(1). Charles v. Daley, 749 F.2d 452 (7th Cir. 1984) (Charles IV). Defendants and Intervening Defendants now appeal from that Decision, Final Judgment, and Order.

THE QUESTIONS ARE SUBSTANTIAL

The State of Illinois may require physicians who prescribe or administer abortifacients to inform their patients that they have done so, when the physician is given broad discretion in determining the manner in which that information is conveyed to the patient.

The State of Illinois has determined hat it is necessary to protect the right its female citizens to choose not to e abortifacients. To this end, the tate enacted §11(d) of the Illinois ortion Law.[1] That section requires hat physicians who administer or rescribe abortifacients inform their atients that they are doing this. othing in §11(d) requires the physician o describe an abortifacient in any paricular manner. He may use whatever anguage he chooses in describing

1. Section 11(d) was renumbered as 11(3) by House Bill 1399. Ill. Rev. tat. ch. 38, ¶81-31(3) (1984 Supp.)

it. Thus, the State leaves broad discretion to the physician to determine the manner in which the required information will be disclosed to his patient.

The Court of Appeals struck down §11(d),[2] stating that it unconstitutionally infringed upon a woman's right of privacy as set forth in Roe v. Wade, 410 U.S. 113 (1973). App. 39-43. This holding is in direct conflict with the decisions of this Court in Planned Parenthood v. Danforth, 428 U.S. 52, 67 (1976), and City of Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481, 2502 (1983).

In Planned Parenthood v. Danforth, the Court held that it is permissible for the State to require a woman's prior,

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2. Section 2(10) defines "abortifacient" so that §11(d) is not vague and doctors will know under what circumstances §11(d) applies. This section was also struck by the Court of Appeals.

written consent to an abortion. In so doing, the Court stated:

> [I]t is desirable and imperative that [the abortion decision] be made will full knowledge of its nature and consequences. The woman is the one primarily concerned and her awareness of the decision and its signficance may be assured constitutionally by the State.

d. at 67.

Again, in Akron, this Court stated: Consistent with its interest in ensuring nformed consent, a State may require that physician make certain that his patient nderstands the physical and emotional mplications of having an abortion." kron, 103 S.Ct. at 2501. Indeed, this ourt stated that a provision that merely escribes in general terms the infor- ation to be disclosed would be per- issible because it leaves the "precise ature and amount of this disclosure o the physician's discretion and 'medical udgment.'" Id.

On its face, §11(d) requires no more than is permissible under Danforth and Akron. It describes in general terms that the doctor must inform his patient that he is prescribing an abortifacient for her if he knows that he is doing this. The precise manner in which the doctor discloses this information is left totally to his discretion.[3] Thus, he is

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3. An abortifacient is "an agent which causes an abortion;" an abortion is defined as "the premature expulsion from the uterus of the products of conception." Dorland's Medical Dictionary 4 (25th ed. 1974). Thus, an abortifacient is an agent that causes the premature expulsion of the products of conception from the uterus. Section 2(10) does not define "abortifacient" more broadly than this, and a physician is free to inform his patient that he is prescribing for her a drug or device which "causes an abortion," or which causes the "premature expulsion from the uterus of the products of conception." Nothing in §11(d) penalizes a physician for describing an abortifacient in this manner. Nor does it in any way require a physician to explain an "abortifacient" to his patient in the manner set forth in §2(10).

given the necessary flexibility that Akron requires.

The State's interest in enacting §11(d) is just as important as the State's interest was in Danforth. There are many different forms of "birth control" practiced in this country today: Some prevent conception and are "contraceptives" (e.g., spermicides, diaphragms, sterilization procedures); others prevent birth after conception has taken place and are "abortifacients" (e.g., prostaglandin suppositories and prostaglandin injections).

With increasing frequency, abortions and abortifacients are being used as methods of birth control.[4] Yet many

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4. Approximately one-third of all abortions performed each year are performed on women who have had at least one prior abortion. Centers for Disease Control, U.S. Dep't of Health and Human Services, Abortion Surveillance 1980, at 37 (Table 13) (1983).

still think of "birth control" as a method of preventing conception since this was its meaning prior to the legalization of abortion; they are not aware that both abortifacients and contraceptives are now considered methods of birth control.

A doctor who prescibes an abortifacient for a woman could truthfully tell her that he is prescribing a method of "birth control" for her. However, a woman who associates "birth control" with contraceptives would not suspect that the method of birth control prescibed was in fact an abortifacient.

Affidavits submitted in the district court by Appellants demonstrate that many women believe that from the time of fertilization the fetus should be valued and not destroyed. See Affidavits of Dianna Shark, Debra Evans, Mary Gasper, and

Delia D'Haern. App. 61-67. These women would use contraceptive methods of birth control but would never knowingly choose to use an abortifacient method of birth control because that would cause the death of an organism already in existence. Plainly, failure to inform such women that something is being administered to them that would cause an abortion would be an egregious violation of their freedom of choice.

Women have a right to choose not to have an abortion that is at least as fundamental as the right to choose abortion. Maher v. Roe, 432 U.S. 464, 472 n.7 (1977). Because of the fundamental nature of this right, the State maintains a compelling interest in its protection that fully justifies the requirements of §11(d).

In spite of the State's compelling

interest in protecting the fundamental right of its female citizens to choose between contraceptive and abortifacient methods of birth control, and the fact that §11(d) requires no more than what is permissible under Danforth and Akron, the Court of Appeals struck it down. In so doing, the court disregarded well-settled principles of statutory construction, and relied on assumptions that were not supported by fact or logic. Thus, it failed to give §11(d) principled constitutional analysis.

In striking §11(d), the court held that it unconstitutionally "force[d] the physician to act as the mouthpiece for the State's theory of life." App. 40. This Court's decision in Akron was cited as authority for the court's holding.[5]

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5. Citing Akron for the proposition that the State may not "foist[] upon the pregnant woman its view that life begins

The language of Akron on which the court relied, however, is inapposite. That statement was made in the context of an ordinance that specifically required a

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at conception," the Seventh Circuit reasoned that "sections 2(10) and 11(d) constitute such an attempt by the State of Illinois because the terms incorporate a definition of 'fetus' in which the State classifies a fetus as a human being from fertilization until death [sic]." "Fetus" was formerly defined as a human being from fertilization until birth. Ill. Rev. Stat. ch. 38, ¶81-22(9) (1983). That definition of "fetus" was amended, by House Bill 1399, prior to the court's ruling, to mean "an individual organism of the species homo sapiens from fertilization to live birth." Ill. Rev. Stat. ch. 38, ¶81-22(6) (1984 Supp.). The court was made aware of that fact but disregarded it in its ruling. Thus, under the new law, as it presently exists, the definition of fetus does not use the term "human being" or "human." While the term "human" may have additional connotations of personhood or membership in society which may be offensive to some, it is an undisputed scientific fact that a new individual of the species homo sapiens begins his or her life at fertilization. Surely the State may define the subject of its regulation [the fetus/unborn child] in a scientifically correct and philosophically neutral fashion.

doctor to tell a woman that "the unborn child is a human life from the moment of conception." Akron, 103 S.Ct. at 2488. Nothing in either §2(10), which is merely definitional, or §11(d), the regulatory provision, requires the doctor to state any such thing.

Moreover, even if an individual doctor chooses to inform his patient that he is administering a drug or device which "kills unborn children," his choice of words cannot be imputed to the State. Only when a statute directs the doctor to use specific words, as did the Akron ordinance, can the use of those words be attributed to the State.[6] Since these sections do not in any way require doc-

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6. The case at bar was brought under 42 U.S.C. §1983 alleging a violation of the right of privacy under the Fourteenth Amendment to the U.S. Constitution. The Fourteenth Amendment and §1983 only protect against state action.

tors to espouse one theory of life by informing their patients that an abortifacient "kills unborn children," or causes fetal death, the requisite "state action" is not present to support a claim under either 42 U.S.C. §1983 or the Fourteenth Amendment, See, Blum v. Yaretsky, 102 S.Ct. 2777, 2786 (1982) (constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct).

Furthermore, unlike Akron, it cannot be said that the State is attempting to influence the woman's decision by merely requiring that a woman be told when an abortifacient is being prescribed for her. It cannot be seriously claimed that it is possible for a woman to choose not to use an abortifacient when she is unaware that one is being prescribed for her.

The court also objected to §11(d) because it felt that it infringed upon the "right of private decision-making in matters relevant to contraception." App.43. It is clear from the statute that the court itself does not grasp the fundamental difference between contraceptives and abortifacients. Section 11(d) applies only when an abortifacient (not a contraceptive) is being prescribed. The only conceivable way that this section could infringe upon a woman's right to use contraceptives, would be if the State were to classify certain contraceptives as abortifacients in an attempt to dissuade women from using those contraceptives. This the State has not done. The definition of "abortifacient" in §11(d) is no broader than the medical definition contained in Dorland's Medical Dictionary. In both cases, the term

applies to drugs or devices that prevent birth after fertilization has taken place. Only those drugs which the physician knows are abortifacients and are in fact abortifacients are covered by §11(d). Therefore, it would be impossible for this section to infringe upon a woman's right to use contraceptives.

Moreover, courts are not free to ignore principles of statutory construction simply because a statute involves abortion, and the Court of Appeals seriously erred in construing §11(d) to require physicians to "notify their patients that the drug or device which they have prescibed will terminate the life of any fetus which their patients might be carrying." App.41. The court's construction was contrary to the plain

language of section 11(d),[7] contrary to the limiting construction of the agencies charged with enforcement of §11(d)[8] and it violated the principle that a statute should be construed in a manner that avoids constitutional attack.

In addition to its misapplication of Akron, the court suggests that §11(d) is unconstitutional because it is somehow inequitable to require that women wishing to use abortifacients be told that they are using them. The court fails to specify what supposed burden is imposed upon

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7. There is nothing on the face of the statute, or in the legislative history, which would support such a construction.

8. Appellants Daley and Hartigan are responsible for enforcement of these provisions. They have repeatedly stated that doctors must only inform the woman that they are administering or prescribing an abortifacient and nothing more. This is a limiting construction which the Court of Appeals was not free to ignore. Village of Hoffman Estates v. Flipside, 102 S.Ct. 1186, 1191 n.5 (1982).

these women and no such burden is set forth in the record. If a woman were not opposed to abortion, it would not be burdensome for her to be informed that a physician has prescribed an abortifacient for her. If, indeed, distress is caused to a woman from knowledge that an abortifacient has been prescribed for her, then it must be because she has reservations about abortion. Sections 2(10) and 11(d) are designed to protect the fundamental rights of women who are opposed to abortion by allowing them to choose intelligently to refrain from using abortifacients. Thus, they protect those women most likely to experience harm: those who unknowingly accept abortifacients and later learn that what they thought was a contraceptive or other medication in fact was an article violating their most deeply held beliefs.

This Court has recognized a fundamental right of women who are opposed to abortion to choose not to submit to an abortion. Maher, 432 U.S. at 472 n.7. It has also recognized the right of States to ensure that a woman's choice of whether or not to have an abortion is informed. Danforth, 428 U.S. at 67. It is axiomatic that the woman know that there is a choice to be made for her to make that choice. However, the Court of Appeals has held that the State of Illinois may not ensure that women are informed whenever an abortifacient is prescibed or administered to them.

The questions raised in this appeal are substantial. Aside from the question of whether the court erred in failing to apply general principles of statutory construction in this case, the court's decision also rested on the relative

weight to be given the rights of women who do not wish to submit to an abortion and those who do. Do these women have an equal right to choose whether or not to obtain an abortion? Or, does the Constitution require States to subordinate their interest in protecting women who do not want abortions (from unwittingly submitting to them) in order to preserve the rights of women who do want abortions but prefer to remain ignorant of the fact that the drugs they are taking will cause an abortion. The Seventh Circuit's opinion answers in the affirmative: All women must be kept ignorant of whether an abortifacient is being administered to them because some women may prefer to use them in ignorance of that fact. Thus, according to the Seventh Circuit, the Constitution prohibits States from requiring that doctors inform their

patients that certain methods of birth control are abortifacients when they are, in fact, abortifacients. Is such a callous approach toward the rights of those who do not wish to submit to abortions to be tolerated? If so, has the federal judiciary taken a new position openly favoring abortion as a policy choice in contravention of its earlier holdings and principles of federalism?

2. A justiciable case or controversy was not present in a facial challenge to Sections 6(1) and 6(4) of the Illinois Abortion Law when the relevant statutory provisions had been amended and substantially altered.

The Court of Appeals held unconstitutional two provisions of the Illinois Abortion Law regulating the standard of care to be employed by physicians in performing abortions upon fetuses of advanced gestational age. These sections are, respectively, §6(1), which applied when the fetus was known to be viable, and §6(4), which applied when it was known that there was a possibility of sustained survival of the fetus apart from the mother. The Court of Appeals ruled upon the merits of plaintiffs' facial challenge to both of these sections, which were enacted as part of S.B. 47, the 1979 amendments to the Illinois Abortion Law.

Prior to adjudication of this matter by the Court of Appeals, however, the General Assembly enacted H.B. 1399, Public Act 83-1128, the 1984 amendments to the Illinois Abortion Law.[9] In so doing, the General Assembly substantially amended and altered both §6(1) and §6(4). These amendments were directly material to this litigation because they addressed several of the alleged constitutional deficiencies present in the "old §6(1) and §6(4)." App.56-59. The old language of both sections imposed a duty of care toward the fetus that was premised upon a standard of equal protection: to employ the same skill, care and diligence to

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9. H.B. 1399 has been challenged in its entirety by several parties, including some of the plaintiffs to this action. Enforcement of its provisions has been enjoined under a temporary restraining order entered into by consent of all parties. Keith, et al. v. Daley, et al., No. 84-C-5602 (N.D. Ill.)

preserve the life and health of the fetus to be aborted as would be required to preserve the life and health of a fetus intended to be born. The duty imposed by the amended language of §6(1) and §6(4) is to use that method of abortion "most likely to preserve the life and health of the fetus." By specifying the duty owed toward the fetus in this manner, the amendments to §6(1) and §6(4) materially affect the vagueness challenge instituted against the old versions of these provisions.

In addition, amendments to both sections clarify that this duty of care applies only to physicians. Section 6(1) is also amended to replace the term "viability" with a specific deliniation of that term that is consistent with the rulings of this Court. Both of these amendments also have a material effect

upon Appellees' vagueness challenges. Finally, H.B. 1399 amended §6(4) to make it applicable only where there is a "reasonable possibility" of sustained fetal survival, as opposed to a mere "possibility." This addresses the contention that the old law could be applied whenever there is any possibility, no matter how remote, of survival.

The Court of Appeals acknowledged that these amendments "substantially transformed" §6(1), and "substantially altered" §6(4). App. 7, 9. Indeed, all of the vagueness questions raised with respect to old §6(1) were mooted by the amendments, and the vagueness questions that could have been raised against §6(4) were also addressed.[10] Yet the court

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10. A live case or controversy still remains with respect to new §6(4) concerning the State's ability to regulate on behalf of the fetus prior to viability. See this jurisdictional statement at 43-44.

failed to recognize that, due to these amendments, the old §6(1) no longer presented a live case or controversy concerning Appellees' facial constitutional attack.

A live case or controversy must exist in order to "satisfy the threshold requirement imposed by Article III." City of Los Angeles v. Lyons, 103 S.Ct. 1660, 1665 (1983). A plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury." Id., Poe v. Ullman, 367 U.S. 497, 505 (1961), and "the injury or threat of injury must be both real and substantial, not conjectural or hypothetical." Lyons, 103 S.Ct. at 1665. "[A]n actual controversy must exist at stages of appellate review . . . and not simply at the date the action is initiated." Roe v. Wade, 410 U.S. 113, 125 (1973).

Since an appellate court must "apply the law as it is now, not as it stood before," the material amendment of a statute during the pendency of a case raises the question of mootness. Schall v. Martin, 104 S.Ct. 2403, 2405 n.2 (1984).

To determine whether there is a "live controversy at the time the Court reviews the case," Sosna v. Iowa, 419 U.S. 395, 402 (1975), the case must be assessed "in light of presently existing . . . law, not the law in effect at the time that judgment was rendered." Fusari v. Steinberg, 419 U.S. 379, 387 (1957). See also, Franks v. Bowman Transp. Co., 424 U.S. 747, 755 (1976). At the time the court's "judgment was rendered," §6(1) and §6(4) had been amended by H.B. 1399, which was passed into law on June 30, 1984. The "live controversy" at that time involved the effect of the amended

sections and if the court intended to render an opinion affecting the rights of the litigants, it ought to have decided the constitutionality of these sections as amended.

The Court of Appeals nevertheless considered the amendments of §6(1) and §6(4) to be a "voluntary abandonment" of conduct challenged by the Appellees. App. 17-18. Therefore, the court applied the relevant exception to the mootness doctrine, and held that the issues in those sections were not moot because the State could "return to its old ways" by re-adopting the old versions of §6(1) and §6(4). App. 20.

While it is true that voluntary cessation of allegedly illegal conduct will not, standing alone, dispel a controversy, it will have this effect if (1) "it can be said with assurance that

there is no reasonable expectation that the alleged violation will recur," and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979).

The amendments to §6(1) and §6(4) clearly fulfill the second of these criteria. Since Appellees' challenge is purely facial in nature, amendment of these provisions cures whatever "chilling" effect the unamended provisions may have had upon Appellees.

The first criterion is also satisfied because there can be no reasonable expectation that the old provisions of §6(1) and §6(4) will ever be re-enacted. The amendment of these sections did not constitute an abandonment by the State of any regulation of abortion, but

rather, consisted entirely of "fine-tuning" which left fully intact the substantive protection of the life and health of the fetus. Under both the old sections and the new, the General Assembly sought to maximize the chances of fetal survival after abortion. It did not simply repeal certain langauge with an intent to moot a constitutional challenge, and then re-enact the same langauge at a later date. Cf. City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 289 (1982).[11]

As the Court of Appeals acknowledged, "the State has attempted repeatedly to alter the contours of that statute [the Illinois Abortion Law] to

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11. Moreover, unlike a municipal ordinance, a state statute is far more difficult to enact. This is especially so in the sensitive area of abortion where, as here, a 3/5 majority vote was necessary to override the gubernatorial vetoes of S.B. 47 and H.B. 1399.

reflect the latest judicial pronouncements in the area of abortion and privacy." App. 20. However, the General Assembly, in the context of abortion regulation, has never repealed a challenged provision, and subsequently re-enacted the provision at a later date. The Court of Appeals would impose upon the State the impossible burden of proving that the Abortion Law will never be amended to turn back the clock on §6(1) and §6(4). Suffice to say, all prior conduct is to the contrary, and hence, there is no reasonable expectation that the General Assembly would ever "return to its old ways" in this manner. Thus, the court clearly erred in addressing old §§6(1) and 6(4) as they stood unamended and repealed.

In addition, the Court of Appeals erred in holding that a live controversy

existed as to §6(1) due to the possibility of prosecutions for violations occuring during the eight months this provision was in effect. Such prosecutions, while a theoretical possibility, do not create a case or controversy adequate for adjudication. "[T]he mere existence of a state penal statute [is an] insufficient ground . . . to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting." Poe v. Ullman, 367 U.S. 497, 507 (1976) (citations omitted). The facial attack in the case at bar was upon vagueness and overbreadth grounds. Appellees were permitted standing because they claimed that old §6(1) would have a chilling effect on the performance of abortions after viability. Since

§6(1) has been amended, it is impossible for the old §6(1) to have such a chilling effect; hence, Appellees' standing to challenge this provision has collapsed. In the exceedingly unlikely event that old §6(1) should ever be applied against any individual Appellee, that individual could, at that time, challenge the statute's application to him.

Furthermore, the enforcement agencies have consistently disclaimed the interpretation of old §6(1) adopted by the court that the State may "second-guess" the attending physician's determination of viability. See this Jurisdictional Statement at 48. The amendments to §6(1) clarify and formalize this position. Hence, the "threat" of enforcement of the old §6(1) has no basis in reality. Indeed, Appellees made no claim that they had

violated old §6(1), even under their tortured construction of the provision, nor have they alleged that they performed any late-term abortions to which old 6(1) would apply. Accordingly, Appellees lack any basis to argue that a live case or controversy exists concerning old §6(1).

However, a live case or controversy does exist with regard to the amended version of §6(4). The basis of Appellees' challenge to the new §6(4) is identical to their challenge of the old §6(4): that any regulation of abortion in the interest of the fetus prior to viability is invalid. Accordingly, the issues to be adjudicated are the same, whether this Court reviews the old §6(4) or the amended verison which is currently under review in Keith v. Daley. Consequently, in the interests of judicial economny, it would be appropriate

for this Court to review §6(4) as it now stands, since this version of §6(4) represents a live controversy that will ultimately be brought before this Court by the same class of plaintiffs presently before this Court.

The questions raised by the Court of Appeals' misinterpretation of and extreme departure from this Court's holdings on mootness are substantial and require supervisory review by this Court.

3. If it did not err in addressing old §6(1), whether the Court of Appeals, in light of the State's compelling interest in post-viable fetal life, nevertheless erred, in disregarding basic rules of statutory construction to strike down a statute, capable of constitutional construction, that established a standard of care applicable to fetuses known to be viable.

This Court in Roe v. Wade and its progeny has repeatedly held that the State has a compelling interest in fetal life at the stage of viability, which authorizes the State to "proscribe abortions altogether, 'except when necessary to preserve the life or health of the mother.'" Akron, 103 S.Ct. 2481, 2492 (1982), Roe, 410 U.S. at 163-64. Regulations at the point of viability are constitutional as long as they are "reasonably designed to further" the compelling interest in fetal life. Akron, 103 S.Ct. at 2495, Danforth, 428 U.S. at 80. Old §6(1) established a standard of

care that was protective of viable fetuses on whom the State has a compelling interest. It did not require any increased risk to the mother and was, therefore, constitutional.

It is well settled that "[w]here fairly possible, courts should construe a statute to avoid the danger of unconstitutionality." Planned Parenthood v. Ashcroft, 103 S.Ct. 2517, 2526 (1983). Also, "[i]n evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." Kolender v. Larson, 103 S.Ct. 1855, 1857 (1983). It was possible for the Court of Appeals to construe old § 6(1) in a constitutional manner, so that the determination of viability was left to "the attending physician on the particular facts of the

case before him." Colautti v. Franklin, 439 U.S. 379, 388 (1979). The court erred in failing to do so.

Section 6(1) did not conclusively specify that the attending physician's determination of viability controls. Rather, it provided that "no person" who performs an abortion "after the fetus is known to be viable" shall fail to exercise the required standard of care. However, the statute easily could have been construed as allowing only the attending physician's determination of viability to control. Indeed, the district court rejected the vagueness challenges upon which the statutes was ultimately struck and upheld §6(1). Charles v. Carey, 579 F.Supp. 464, 472-73 (N.D. Ill. 1983). Thus, it was not only possible but reasonable to construe the statute in a constitutional manner.

Moreover, those charged with enforcement of the law State's Attorney Daley and Attorney General Hartigan, consistently construed §6(1) in a manner that made it clear that the attending physician's judgment of viability was to control. Brief in Court of Appeals at 10 (adopted by Defendants Daley and Hartigan). This limiting construction must be considered by the federal court especially in a facial challenge. Kolender, 103 S.Ct. at 1857. The Court of Appeals erred in completely ignoring this limiting construction.[12]

The State has a compelling interest in protecting post-viable fetal life. Roe v. Wade, 410 U.S. 113, 153 (1973). That

12. Although the State of Illinois chose to affirmatively amend 6(1) to streamline the section and more explicitly state its intentions, and better trade the langauge of new sections of the law, this does not mean that it felt that old §6(1) was unconstitutional.

interest was effectively nullified by the Seventh Circuit's failure to apply basic rules of statutory constuction as it was required to do. This failure on the part of the Court of Appeals presents yet another substantial question meriting this Court's review.

4. Whether the State of Illinois can protect its strong interest in fetal life by requiring that the method of abortion be used that is most likely to preserve the life of the fetus, at that time in pregnancy when the fetus has a reasonable possibility of survival?

The State has a legitimate interest in protecting fetal life throughout pregnancy which grows in substantiality as the pregnancy advances. Roe, 410 U.S. at 163-64. The State of Illinois has sought to further its interest in protecting fetal life by regulating the method by which an abortion may be performed so as to maximize the chances for fetal survival. To this end, §6(4) requires that the method of abortion most likely to preserve the life and health of the fetus be utilized when there is a reasonable possibility of fetal survival. Section 6(4) does not apply when the fetal survival method of abortion would increase risk to the mother. See §6(5), App.60.

Thus, the State has sought to further its legitimate interest in protecting the fetus without in any way infringing upon the woman's right to terminate her pregnancy.

The only effect of §6(4) is to restrict hostile activity directed toward the fetus. In no circumstance does §6(4) place any obstacle on the decision of whether or not to terminate the pregnancy. The woman remains free to consult with her physician and decide to terminate her pregnancy for whatever reason she and her physician decide upon. She also remains free to effectuate the decision by legally terminating her pregnancy. Section 6(4) only restricts the manner in which the termination of pregnancy--emptying of the womb--can take place. And, it does so in a manner that is consistant with the preservation

of the woman's health.

Since §6(4) operates when there is a reasonable possibility of sustained survival of the fetus outside the womb, it is correct to say that it operates prior to "legal" viability; a stage in pregnancy when the State's interest in protecting fetal life has not yet become compelling.

As a constitutional matter, the concept of "viability" is relevant only during pregnancy, prior to birth. It is not applicable to infants after birth. Moreover, "viability" amounts to a physician's informed estimate, while a child is yet in the womb, about the likelihood of that child's survival outside the womb. Only when the physician judges that there is a reasonable likelihood of sustained survival does the State acquire a "compelling interest" in the fetus suf-

ficient to override, to some extent, the still extant constitutional right of the woman to terminate her pregnancy. The concept of viability as a legal principle is, thus, fixed as a subjective judgment upon which no liability can attach. Colautti, 439 U.S. at 381. The physician's good faith judgment of non-viability, however, is not necessarily accurate medically.[13] Thus, it is also correct to say that §6(4) operates during a time when the fetus may in actuality survive an abortion--a stage when the State's interest in fetal life is, at least, very substantial.

Therefore, although a particular

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13. Even the most advanced techniques of estimating gestatinal age have an error rate of plus or minus two weeks. See, e.g., Margaret S. v. Edwards, 488 F.Supp. 181, 198 (E.D. La. 1980).

fetus may not be viable in a legal sense, non-viable fetuses can and do actually survive abortion. Although many of these newborns die soon after birth, some survive indefinitely. See, e.g., Stroh & Hinman, 126 Am.J. Obstet. Gynecol. 83 (1976) (2 children survived saline abortions and were living with adoptive parents).

Section 6(4) does not seek to prohibit any abortions during the stage when the fetus is not quite legally viable. It merely seeks to regulate the manner in which the abortion is performed without increasing risk to the mother. The various methods of abortion cause greater or lesser complications for the fetus. It is logical for the State to seek to minimize the damage that will be done to the fetus by the abortion procedure, so that if the fetus should survive the

abortion he or she will not be more severely handicapped than is necessary.

Proper balancing of the state interest and the woman's right of privacy dictates that §6(4) be upheld. The abortional right, as recognized by the Supreme Court, is a right to decide whether or not to terminate pregnancy (to expel the fetus from the womb) and to safely effectuate the decision. Roe v. Wade, 410 U.S. at 153, Connecticut v. Menillo, 423 U.S. 9, 10 (1975).

The right does not include a right to actively seek to kill the fetus when there is a reasonable possibility that the fetus is capable of sustained survival outside the womb. No court has ever held that the right secured in Roe is so expansive. In fact, such a notion has been specifically rejected. In Wynn v. Scott, the court noted:

> [The statute] does not require that the physician increase the risk to the woman in order to save the fetus. If, however, there are instances where a physician has a choice of procedures, both of equal risk to the woman, the physician must choose the procedure which is least likely to kill the fetus. This choice would not interfere with the woman's right to terminate her pregnancy. It never could be argued that she has a constitutionally protected right to kill the fetus. She does not.

Wynn v. Scott, 449 F.Supp. 1302, 1321 (N.D. Ill. 1978), (Circuit Judge Tone and District Judges Marshall and Kirkland), aff'd sub nom., Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979).

Despite the substantiality of the State's interest in the fetus who has a reasonable possibility for sustained survival, and the fact that §6(4) does not infringe upon a woman's right to terminate her pregnancy as that right has been recognized by this Court, the Court of Appeals held that the State could not

constitutionally regulate abortion in this manner. App.36.

The court's analysis is seriously flawed. The court assumes that there is a burden upon the woman's right to terminate her pregnancy without first examining the scope of that right or the nature of the supposed burden.

Sound constitutional analysis cannot proceed by the mechanistic approach taken by the court. The court simply states that the regulation operates prior to viability and therefore cannot support the State's regulation on behalf of fetal life. App.35.

The implication of its decision is that the State's interest in the fetus is non-existent prior to viability, and then suddenly becomes compelling at viability. Such is not the case. As mentioned earlier, that interest grows in

substantiality and at the time when §6(4) operates is just shy of compelling.

Moreover, the court totally failed in a proper analysis of the supposed burden that this section imposes upon a woman. The woman has no right to kill her fetus. She has only a right to terminate her pregnancy in a safe manner. Section 6(4) regulates the method of abortion without increasing risk to the mother. Therefore, a woman remains free to obtain a safe pregnancy termination for whatever reason she wishes. In spite of this, the Seventh Circuit held that §6(4) did impose a burden on a woman because there is a "possibility that the woman will be unable to exercise her privacy right because her doctor refuses to perform an abortion at the risk of inducing criminal sanction." App.34.

This circular analysis begs the

uestion that is critical to a principled onsitutional analysis of §6(4). That uestion is whether the woman has a onstitutional right to terminate her regnancy in a manner that ensures fetal eath. If she does not have such a ight, then she has no constitutionally rotected right to obtain an abortion by method that will ensure fetal death. er inability to obtain such an abortion ould not be said to violate any consti- utional right.

To hold otherwise would be contrary o common sense and the holdings of this ourt. For example, under the court's nalysis, it would be impermissible for a tate to require that all abortions be erformed by a physician since the refu- al of doctors, in certain areas of the ountry, to perform any abortions would

limit the woman's access to abortion and would constitute an unconstitutional burden on the woman's right to terminate her pregnancy.

Such analysis was explicitly rejected by the Court in Connecticut v. Menillo, 432 U.S. at 10. In Menillo, the Court first determined that a woman does not have a constitutional right to obtain an abortion in an unsafe manner. Since she has no constitutional right to obtain an abortion by a nonphysician, the Court held that a state statute requiring that all abortions be performed by physicians did not violate the woman's right to terminate her pregnancy. Id.

Moreover, sound constitutonal adjudication requires close attention to what consequences flow from "state action" and what consequences flow from unrelated

rivate decisions and conduct. The former may be conceived as "burdens" on the right to abort, while the latter lack constitutional significance. Particularly close attention to this distinction is warranted in the present context since it is claimed that the private refusal of doctors to provide abortions using the method most likely to cause fetal survival imposes a consitutional burden on a woman's right to terminate her pregnancy by limiting her access to abortions.

The requirements of §6(4) neither coerce nor significantly encourage any physician to refuse to perform abortions by the method most likely to result in fetal survival. Thus, the private decisions of some physicians to refuse to perform all abortions when there is a reasonable possibility of fetal survival, simply because they are unable to perform

them by a method that would ensure fetal death, cannot be attributed to the State.

The main issue presented in the challenge to old §6(4) and upon which both the District Court and the Court of Appeals ruled is identical to that raised against new §6(4).[14]

There is a substantial question presented for review by this Court. That question concerns the State's ability to regulate prior to legal viability on behalf of the fetus in a manner that does not infringe upon a woman's right to terminate her pregnancy. Central to this question is the appropriate scope of the right to terminate pregnancy. Does it include a right to kill the fetus? Or, does it simply include a right to safely

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14. Although changes in the statutory language substantially removed other minor issues from continued controversy, the primary issue remains unaltered in new §6(4).

erminate pregnancy? These issues equire the plenary review of this Court.

CONCLUSION

Probable jurisdiction should be oted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 83-3175, 83-3176, 83-3177, 83-3253

ALLAN G. CHARLES, M.D., et al.,
Plaintiffs-Appellees/Cross-Appellants,
v.
RICHARD M. DALEY, et al.,
Defendants/Appellants/Cross-Appellees,
EUGENE F. DIAMOND, M.D., et al.,
Intervening Defendants-Appellants/
Cross-Appellees.

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,
Plaintiffs-Appellees,
v.
RICHARD M. DALEY, et al.,
Defendants-Appellants,
EUGENE F. DIAMOND, MD., et al.,
Intervening Defendants-Appellants

Appeals from the United States District Court for the Northern District of Illinios, Eastern Division.
Nos. 79-C-4541, 79-C-4548;
Charles Kocoras, Judge.

Argued September 19, 1984--
Decided November 30, 1984

Before WOOD, Circuit Judge, PELL, Senior Circuit Judge and CAMPBELL, Senior District Judge.*

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* William J. Campbell, Senior District Judge for the Northern District of Illinois, sitting by designation.

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PELL, Senior Circuit Judge.

This case confronts the court with the review of cross-motions for summary judgment. Defendants Richard M. Daley, Illinois State's Attorney, et al., and intervening defendants Dr. Eugene F. Diamond and Dr. Jasper F. Williams appeal from the district court's grant of a permanent injunction against the enforcement of three sections of the Illinois Abortion Law.1/ Defendants and intervening defendants also appeal from the district court's grant of plaintiffs' motion to strike intervening defendants' Exhibit 2, which intervening defendants affixed to their motion for summary judgment. Intervening defendants Exhibit

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1. District Judge Charles Kororas entered a permanent injunction against the enforcment of sections 6(4), 2(10) and 11(d) of the Illinois Abortion Law of 1975, as amended by S.B. 47 and S.B. 666, on October 14, 1983.

2 contained excerpts from a newspaper series entitled The Abortion Profiteers.

Plaintiffs Dr. Allan G. Charles, et al., and The Hope Clinic for Women, Ltd., et al., appeal from the district court's denial of their motion for a permanent injunction against the enforcement of section 6(1) of the Illinois Abortion Law. The district court declined to enjoin section 6(1) because the court found that a recent amendment to the Abortion Law, which section 6(1) incorporated, removed section 6(1)'s constitutional infirmities.

Section 6(1), along with section 6(4), was the subject of a preliminary injunction entered by then District Judge Joel Flaum on November 16, 1979. Judge Flaum enjoined these sections because they incorporated an unconstitutional definition of viability. Judge Flaum

declined to enter a preliminary injunction against sections 2(10) and 11(d).

Plaintiffs appealed Judge Flaum's denial of a prelmiminary injunction with respect to sections 2(10) and 11(d) to this court. This court disagreed with Judge Flaum and found plaintiffs entitled to a preliminary injunction of these sections. Charles v. Carey, 627 F.2d 772, 789-90 (7th Cir. 1980). This court ruled that the sections failed to pass constitutional muster because the sections forced physicians "to act as the mouthpiece for the State's theory of life." Id.

Plaintiffs moved for summary judgment on the basis of these preliminary injunctions and sought the entry of a permanent injunction against sections 6(1), 6(4), 2(10) and 11(d). Defendants and intervening defendants also sought

summary judgment on the basis that the preliminary injunctions against these sections were erroneously entered. As previously noted, Judge Kocoras of the District Court granted plaintiffs' motion for a permanent injunction against the enforcement of sections 6(4), 2(10) and 11(d). Judge Kocoras granted defendants' and intervening defendants' motion for summary judgment with respect to section 6(1). Judge Kocoras furthermore struck intervening defendants' Exhibit 2, which intervening defendants submitted in support of their motion for summary judgment. These rulings by the district court form the basis of this appeal.

I. THE STATUTE

A. Section 6(1)

Section 6(1) of the Illinois Abortion Law of 1975, as amended by S.B.

47, S.B. 666 and H.B. 1399 2/ imposes a standard of care on physicians who perform abortions on a viable fetus. Section 6(1), as it existed at the time plaintiffs, defendants and intervening defendants moved for summary judgment, read as follows:

> No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable before or after birth commits a Class 2 felony if the death of a viable fetus or infant results from such failure.

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2. S.B. 47 took effect October 30, 1979. S.B. 666 took effect September 17, 1983. H.B. 1399 took effect June 30, 1984.

ILL. REV.STAT. ch. 38, ¶81-26 (1983). On September 17, 1983, the Illinois legislature amended its definition of viability and incorporated this amendment into section 6(1). The amendment made viability a subjective determination based on the medical judgment of the attending physician. Judge Kocoras evaluated section 6(1) with reference to this intervening amendment.

On June 30, 1984, the Illinois legislature amended section 6(1) again. This recent amendment substantially transformed section 6(1). The amendment is the subject of a temporary restraining order entered by the Northern District of Illinois in Keith v. Daley, No. 84 C 5602 (N.D.Ill. 1984), a separate lawsuit. This court accordingly declines to discuss the constitutionality of the 1984 amendment.

B. Section 6(4)

Section 6(4) of the statute, as amended, imposes a similar standard of care on physicians performing abortions on a possibly viable fetus. When plaintiffs, defendants and intervening defendants filed their motions for summary judgment in the district court, section 6(4) read, in pertinent part:

> No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and/or health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of more than momentary survival of the fetus, apart from the body of the mother, with or without artificial support.

ILL.REV.STAT. ch. 38, ¶81-26 (1983). District Judge Kocoras permanently enjoined section 6(4) despite the 1983

amendment to the statute's definition of viablity, which section 6(4) incorporated. In 1984, H.B. 1399 substantially altered section 6(4). Because this amendment to section 6(4) is also the subject of the temporary restraining order entered in Keith v. Daley, No. 84 C 5602 (N.D.Ill. 1984), this court declines to evaluate its constitutionality.

C. Sections 2(10) and 11(d)

Section 2(10) of the Illinois Abortion Law of 1975, as amended by S.B. 47, defines an "abortifacient" method of birth control. Section 11(d) of that statute requires a physician who prescribes an "abortifacient" method of birth control to inform his patient that he has done so. The Illinois legislature enacted these sections as follows:

> Sec. 2(10). "Abortifacient" means any instrument, medicine, drug, or any other substance or device which is known to cause fetal death when

> employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed.
>
> Sec. 11(d). Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact and abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for which it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor.

ILL.REV.STAT. ch. 83, ¶¶81-22, 81-31 (1983). Unlike sections 6(1) and 6(4), sections 2(10) and 11(d) are not the subject of recent amendment, and are not before the district court in Keith v. Daley, supra. This court will accordingly address the constitutionality of these sections in their current form.

II. MOOTNESS

Before reaching the constitutionality of sections 6(1), 6(4), 2(10) and 11(d), however, this court must address the issue of mootness. During oral argument before this court, intervening defendants suggested for the first time that plaintiffs' constitutional challenges to sections 6(1) and 6(4) were moot. Intervening defendants based their mootness argument on the fact that the Illinois legislature had amended both sections during the pendency of this appeal. Because H.B. 1399 and its amended sections 6(1) and 6(4) superseded the versions of those sections reflected in S.B. 47, intervening defendants argue that these superseded versions cannot threaten the exercise of plaintiffs' constitutional rights. Consequently, intervening defendants contend, the

constitutionality of S.B. 47's version of sections 6(1) and 6(4) is not a live controversy. Intervening defendants therefore assert that this court is without power to review them.

The concept of mootness, indeed, defines constitutionally minimal conditions for the invocation of federal judicial power. Franks v. Bowman Transportation Co., 424 U.S. 747, 754, 96 S.Ct. 1251, 1259, 47 L.Ed.2d 444 (1976). Moreover, a moot case does not present a "case or controvesy" within the meaning of Article III. See Geraghty v. United States Parole Commission, 579 F.2d 238, 245 (3d Cir. 1978)(extensive discussion of the mootness doctrine), vacated on other grounds, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). However, the determination of which cases survive the limitations imposed by the mootness

doctrine and which cases do not is not a facile endeavor. As this court recently observed in Commodity Futures Trading Commission v. Board of Trade, 701 F.2d 653, 655 (7th Cir.1983):

> Although mootness is sometimes painted in black and white--"federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them," ... it really should be painted in shades of gray since few controversies are wholly beyond the power of changed circumstances to revive....

(Citing North Carolinia v. Rice, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971). This court, accordingly, shall examine the mootness issue in this case with awareness that our determination must respect the "fundamental policies informing the 'cases or controversies' limitation imposed by Article III." Franks v. Bowman Transportation Co., 424 U.S. at 754, 96 S.Ct. at 1259. In addition, this court

acknowledges that a defendant alleging mootness carries a heavy burden of persuasion. See United States v. Phosphate Export Association, Inc., 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968); Sanchez v. Edgar, 710 F.2d 1292, 1294-95 (7th Cir. 1983); Halet v. Wend Investment Co., 672 F.2d 1305, 1308 (9th Cir.1982).

A. Section 6(1)

Section 6(1) of S.B. 47 was the subject of a preliminary injunction entered by Judge Flaum on November 16, 1979. Judge Kocoras refused to make this injunction permanent with respect to section 6(1), however, because he believed that an intervening amendment to the section's definition of viability removed its constitutional infirmities.

As a result, the S.B. 47 version of section 6(1) remained in effect from October

14, 1983, the date of Judge Kocoras' decision, until June 30, 1984, the date H.B. 1399 superseded S.B. 47.

S.B. 47 made the violation of section 6(1) a Class 2 felony if the death of a viable fetus or infant occurred as the result of an abortion. ILL.REV.STAT. ch. 38 ¶81-26 (1983). The statute of limitations for such Class 2 felonies allows the State a period of three years from the date of the offense within which to commence prosecution. ILL.REV.STAT. ch. 38 ¶3-5 (1983). This three year period is still running with respect to violations of section 6(1) which occurred between October 14, 1983, and June 30, 1984. Thus, the State of Illinois could prosecute plaintiffs for violation of S.B. 47's section 6(1) if plaintiffs violated that section while it remained in effect.

We find this possibility insufficiently speculative to render plaintiffs' challenge to the S.B. 47 version of section 6(1) moot. Defendants and intervening defendants have offered no evidence to rebut this possiblity of prosecution. As a result, this court finds plaintiffs' challenge to S.B. 47's section 6(1) a live controversy within the meaning of Article III.

B. Section 6(4)

Judge Flaum preliminarily enjoined the enforcement of S.B. 47's section 6(4) on November 16, 1979. Judge Kocoras made this injunction permanent approximately four years later. Judge Kocoras did not believe that the statute's amended definition of viability could salvage section 6(4) because section 6(4) continued to regulate pre-viability abortions.

Unlike section 6(1), section 6(4)

has been subject to continuous injunction since plaintiffs' initial challenge to its constitutionality in 1979. Thus, this court's mootness analysis with respect to section 6(10) is inapposite to the alleged mootness of section 6(4). Nevertheless, this court finds that plaintiffs' challenges to both sections present live controversies despite the intervening amendments to these sections reflected in H.B. 1399.

The State's revision of section 6(4) pending this appeal implicates a well-known line of mootness cases. 3/ See, e.g., City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982); Quern v.

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3. The State's revision of section 6(1) pending this appeal likewise implicates this line of cases. In the case of section 6(1), however, there are additional and more compelling reasons to avoid a mootness holding.

Mandley, 436 U.S. 725, 98 S.Ct. 2068, 54 L.Ed.2d 658 (1978); United States v. Phosphate Export Association, Inc., 393 U.S. 199, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). This line of cases focuses on a defendant's voluntary abandonment of conduct challenged by a plaintiff. Many of these cases involve revisions to allegedly illegal procedures, ordinances or statutes pending a plaintiff's appeal. By revising their allegedly illegal measures, defendants in these cases seek to moot plaintiffs' appeals.

A recent example of such voluntary abandonment confronted the Supreme Court in City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982). In that case, plaintiff Aladdin's Castle contended that a municipal zoning ordinance was unconstitutionally vague. During the pendency

of plaintiff's appeal, defendant city revised the ordinance and removed its objectionable langauge. The Supreme Court held that this revision did not moot plaintiff's appeal. Id. 455 U.S. at 289, 102 S.Ct. at 1074. The Supreme Court observed, in so holding:

> The test for mootness in cases such as this is a stringent one. Mere voluntary cesstion of allegedly illegal conduct does not moot a case; if it did the courts would be compelled to leave "[t]he defendant ... free to return to his old ways."

Id. at 289 n. 10, 102 S.Ct. at 1074 n. 10 (citing United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953)).

Like the defendant city in Aladdin's Castle, the State of Illinois could re-enact S.B. 47's version of section 6(4) if this court dismissed plaintiffs' challenge to that section. Indeed, the very number of amendments made to the

challenged statute in the last several years persuades this court that such a result would not be unlikely. Moreover, the history of the Abortion Law suggests that the State has attempted repeatedly to alter the contours of that statute to reflect the latest judicial pronouncments in the area of abortion and privacy. As a result, defendants and intervening defendants have failed to prove to this court that the State will not "return to its old ways' if the court dismisses plaintiffs' claim.

In addition, defendants and intervening defendants have not demonstrated that H.B. 1399 irrevocably eradicted the effects of the challenged version of section 6(4). Defendants and intervening defendants have not demonstrated, for example, that any chilling effects caused by that section no longer exist. Recent

Supreme Court cases dealing with the mootness issue suggest that such eradicatation is an additional prerequisite to mootness. See City of Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); County of Los Angeles v. Davis, 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979). Consequently, defendants and intervening defendants have not convinced this court that plaintiffs' challenge to section 6(4) is moot. The court will address the constitutionality of each of the challenged sections in turn.

III. CONSTITUTIONAL ANALYSIS

In its seminal opinion in the case of Roe v. Wade, 410 U.S. 113, 153, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973), the Supreme Court decided that a woman's fundamental right of privacy, which derived from the Fourteenth Amendment's

concept of personal liberty, encompassed a woman's decision whether to terminate her pregnancy. Earlier opinions by the Court had established that a woman's right of privacy encompassed her freedom of choice regarding activities related to marriage and contraception. See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972). The Roe opinion extended the reasoning of such earlier cases to a woman's decision whether to procure an abortion.

In Roe, the Court additionally identified certain interests of the State which competed with the woman's interest in freely choosing abortion. These State interests were the protection of maternal health and the preservation of fetal life. Roe, 410 U.S. at 150, 93 S.Ct. at 725. The State's interest in protecting maternal health became compelling at the

end of a woman's first trimester of pregnancy. Id. at 163, 93 S.Ct. at 731. The State's interest in preserving fetal life became compelling at the stage of viability. Id. Prior to the stages at which the State's interests became compelling, the State could not interfere with the woman's decision, in consultation with her physician, to abort her fetus. Id. at 165-66, 93 S.Ct. at 732-733.

Cases subsequent to Roe have reaffirmed its analysis. These cases have stricken various attempts by the State to discourage a woman from choosing abortion. See, e.g., Planned Parenthood v. Ashcroft, 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983); Bellotti v. Baird, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (plurality opinion); Colautti v. Franklin, 439 U.S. 379, 99

S.Ct. 675, 58 L.Ed.2d 596 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976). At the same time, however, the Supreme Court has acknowledged that the State may encourage alternatives to abortion in ways that do not interfere with a woman's decision. See Williams v. Zbaraz, 448 U.S. 358, 100 S.Ct. 2694, 65 L.Ed.2d 831 (1980); Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2 784 (1980); Poelker v. Doe, 432 U.S. 519, 97 S.Ct. 2391, 53 L.Ed.2d 528 (1977)(per curiam); Maher v. Roe, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977). The Supreme Court, furthermore, has upheld a requirement that second trimester abortions be performed in a licensed clinic, Simopoulos v. Virginia, 462 U.S. 506, 103 S.Ct. 2532, 76 L.Ed.2d 755 (1983), and a requirement that parents of imma-

ture, dependent minors receive notice of their child's attempt to procure an abortion, H.L. v. Matheson, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981). This court must evaluate the State of Illinois' attempts to regulate the performance and procurement of abortions in light of the post-Roe decisions.

A. Section 6(1)

Section 6(1) of S.B. 47 imposes a standard of care on physicians and others who assist physicians in the performance of abortions on a viable fetus. That section makes it a Class 2 felony to fail to use the same care in aborting a viable fetus that the physician, or his assistant, would be required to use in bringing a viable fetus to live birth. To be liable under the section, a physician or his assistant must intend to terminate the mother's pregnancy and must

intentionally fail to use the requisite degree of care in performing the abortion.

Section 6(1) applies when the fetus is "known to be viable." Section 6(1) does not specify, however, which party, physician or assistant, must make this viability determination. Consequently, the section could make criminal an assistant's failure to use the requisite care in aborting a fetus which the assistant, but not the physician, believes in [sic] nonviable. In addition, the section could make criminal a physician's failure to observe the required standard of care in situations where some other physician, but not the treating physician, believes that the fetus is viable.

This court acknowledges that the State's interest in preserving fetal life is compelling at the stage of viability.

See Roe v. Wade, 410 U.S. at 163, 93 S.Ct. at 731. The State, therefore, may regulate abortions at or after the stage of viability even if the State's regulations interfere with a woman's fundamental right to choose abortion. 4/ However, the State may only regulate in such context if it narrowly tailors its regulations to the precise State interest at stake. Roe, 410 U.S. at 165, 93 S.Ct. at 732.

Moreover, in serving its compelling interest, the State must respect the physician's central role in consulting with the woman and in determining how to carry out her abortion. See Colautti v. Franklin, 439 U.S. at 387, 99 S.Ct. at

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4. The Roe decision makes clear that a State may even proscribe abortion after the stage of viability, except where abortion is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Roe, 410 U.S. at 164-65, 93 S.Ct. at 732.

681. In particular, the State may not interfere with the attending physician's medical judgment in determining the precise point in a woman's pregnancy at which viability exists. Id. 439 U.S. at 395-96, 99 S.Ct. at 685-86. "[T]he determination of whether a particular fetus is viable is, and must be, a matter for the responsible attending physican." Planned Parenthood v. Danforth, 428 U.S. at 64, 96 S.Ct. at 2839. Because section 6(1) does not specify that the attending physician's viability determination alone shall govern, section 6(1) improperly encroaches on the attending physician's medical judgment in treating his patient.

This court does not hold that the State may never prescribe standards of care to physicians, or their assistants, who perform abortions on a fetus which has attained viablity. Rather, this

court holds that when the State prescribes such standards, it must afford due deference to the conclusive viability determination of the attending physician. In addition, the State must precisely tailor its standards of care to the particular State interest at stake so that its statute precisely notifies physicians and their assistants as to what conduct by them the State purports to condemn. Section 6(1) fails to give physicians and their assistants such explicit notice. Under these circumstances, the State must proceed with greater precision before it may subject a physician, or his assistant, to criminal sanction. Colautti v. Franklin, 439 U.S. at 400-01, 99 S.Ct. at 688.

Where a vague statute "abuts upon" the exercise of fundamental rights, the statute "operates to inhibit the exercise

of such freedoms." Planned Parenthood Association v. Fitzpatrick, 401 F.Supp. 554, 571 (E.D.Pa.1975) (citing Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972)), aff'd sub nom. Franklin v. Fitzpatrick, 428 U.S. 901, 96 S.Ct. 3202, 49 L.Ed.2d 1205 (1976). Because this section abuts upon a woman's fundamental right to consult her doctor about abortion and to receive her doctor's unimpeded medical judgment, it threatens to chill the exercise of her freedom. Specifically, the section encumbers the woman's exercise of a constitutionally protected right by placing obstacles in the form of criminal sanctions in the path of the doctor upon whom she is entitled to rely for advice. Akron Center For Reproductive Health, Inc. v. City of Akron, 479 F.Supp. 1172, 1198 (N.D.Ohio 1979)(citing Whalen v.

Roe, 429 U.S. 589, 604, 97 S.Ct. 869, 879 51 L.Ed.2d 64 (1977)), aff'd in part and rev'd in part, 651 F.2d 1198 (6th Cir. 1981), aff'd in part and rev'd in part, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983). The section imprecisely informs physicians and their assistants as to what conduct by them the State prohibits. The section, therefore, threatens to chill the exercise of a physician's best medical judgment in consulting with his patients about abortion. The State has failed to reflect precisely its compelling postviability interests by drafting a statute affording physicians, and their assistants, due notice before the State subjects them to criminal sanction. As a result, this court finds section 6(1) unconstitutionally vague. 5/

5. The statute's amended definition of viability, reflected by S.B. 666, does not alter our result, because section 6(1) still fails to inform the physician as to whose viability determination controls.

B. Section 6(4)

Section 6(4) of S.B. 47 imposes a similar standard of care on physicians and their assistants who perform abortions on a possibly viable fetus. Section 6(4) makes it a Class 3 felony to fail to observe the same standard of care in aborting a possibly viable fetus that the physician, or his assistant, would be required to observe in bringing a possibly viable fetus to live birth. Like section 6(1), criminal liability under section 6(4) requires that the physician or his assistant intend to terminate the mother's pregnancy, and that the physician or his assistant intentionally fail to observe the required standard of care.

Unlike section 6(1), however, section 6(4) purports to regulate not only the abortion of a viable fetus, but also the abortion of a fetus which is

potentially viable. Thus section 6(4) purports to regulate the performance of abortions at a stage prior to viability. As Roe v. Wade, 410 U.S. at 163, 93 S.Ct. at 731, makes clear, the State's interest in preserving fetal life is not compelling before the viability stage. As a result, the State must present a different compelling interest to justify the direct interference with a woman's freedom to choose an abortion that section 6(4) represents.

In particular, section 6(4) creates a direct interference with a woman's right to discuss abortion with her physician and to receive her physician's unimpeded medical judgment because section 6(4) places obstacles in the form of criminal sanctions in the path of the physician upon whom she is entitled to rely for advice. See Akron

Center For Reproductive Health, Inc. v. City of Akron, 479 F.Supp. at 1198. Intervening defendants claim that the section creates no interference with the woman's right to choose abortion because the section penalizes only hostile activity toward the fetus unrelated to the exercise of the woman's privacy right. This contention ignores, however, the possibility that the woman will be unable to exercise her privacy right because her doctor refuses to perform an abortion at the risk of inducing a criminal sanction.

This court finds that such a possibility significantly burdens a woman's right to terminate her pregnancy. Because section 6(4) creates such a burden, the State must justify it by means of a compelling interest and must prove that it has tailored section 6(4) narrowly to protect only the legitimate

State interest at stake. Carey v. Population Services International, 431 U.S. 678, 688, 97 S.Ct. 2010, 2017, 52 L.Ed.2d 657 (1977)(citing Roe v. Wade, 410 U.S. at 155, 93 S.Ct. at 727). The Supreme Court has recognized two such compelling interests that may justify a restriction of the right to choose abortion. City of Akron v. Akron Center For Reproductive Health, Inc., 462 U.S. 416, 103 S.Ct. 2481, at 2491, 76 L.Ed.2d 687. One of these compelling interests, the State's interest in preserving fetal life, becomes compelling only at the stage of viabality. Roe v. Wade, 410 U.S. at 163, 93 S.Ct. at 731. As a consequence, the State's interest in preserving fetal life cannot justify section 6(4) because section 6(4) applies to certain pre-viability abortions.

The second compelling State interest

recognized by the Supreme Court in the area of abortion is the State's legitimate concern with the health of the woman. City of Akron, 103 S.Ct. at 2492. Section 6(4), however, penalizes hostile activity which is harmful to the health of the fetus and does not seek to protect the health of the mother. As a result, the State's legitimate concern with the health of the mother cannot justify section 6(4). Because the State has advanced no other compelling interest which could justify Section 6(4)'s restriction on a woman's freedom to choose an abortion, this court must find that section 6(4) unconstitutionally infringes on the woman's fundamental right. Section 6(4) is therefore invalid.

C. Sections 2(10) and 11(d)

Section 2(10) of S.B. 47 defines an

abortifacient as any substance or device which is known to cause fetal death. Section 11(d) of that statute requires physicians who prescribe or administer abortifacients to inform their patients that they have done so. If a physician intentionally, knowingly or recklessly fails to inform his patient that he has prescribed or administered an abortifacient, the physician commits a Class C misdemeanor.

Intervening defendants assert that the Illinois legislature passed sections 2(10) and 11(d) in order to protect those women who oppose abortifacient methods of birth control for moral and/or religious reasons. Intervening defendants also assert that the sections do not interfere with a woman's freedom to choose abortion, or her freedom to choose any method of birth control. Rather, intervening

defendants contend that the sections merely require physicians to give information to their patients concerning "what will be done [to them] and as to its consequences." Planned Parenthood v. Danforth, 428 U.S. 52, 67 n.8, 96 S.Ct. 2831, 2840 n.8, 49 L.Ed.2d 788 (1976).

In Danforth, the Supreme Court acknowledged that the State could require such a limited form of informed consent before a woman underwent an abortion. Id. The Court cautioned, however, that a more detailed requirement of informed consent could confine the attending doctor in an undesired and uncomfortable straitjacket in the practice of his profession. Id. The Court later relied upon its cautionary remarks in Danforth to strike down a state's requirement that the physician recite a lengthy and inflexible list of information before his

patient could have an abortion. City of Akron v. Akron Center For Reproductive Health, Inc., 103 S.Ct. at 2501. The Court reaffirmed in that later case that the State could not intrude upon the discretion of the pregnant woman's physician. Id. at 2500.

The Supreme Court, moreover, has denied the states the power to override the rights of a pregnant woman by adopting one theory of when life begins. Roe v. Wade, 410 U.S. at 162, 93 S.Ct. at 731. See also City of Akron, 103 S.Ct. at 2500. In particular, the Court has prohibited the State from foisting upon the pregnant woman its view that life begins at conception in order to justify its regulation of abortion. City of Akron, 103 S.Ct. at 2500. See also Eubanks v. Collins, 10 Fam.L.Rep. (BNA) 1659 (W.D.Ky. Sept. 11, 1984). This

court finds that sections 2(10) and 11(d) constitute such an attempt by the State of Illinois because the sections incorporate a definition of "fetus" in which the State classifies a fetus as a human being from fertilization until death. ILL.REV.STAT. ch. 38 ¶81-21 (1983). As this court noted in Charles v. Carey, 627 F.2d 772, 789 (7th Cir. 1980), "the use of the term 'abortifacient' in describing certain birth control methods forces the physician to act as the mouthpiece for the State's theory of life."

Intervening defendants dispute that the sections require physicians to reiterate the State's theory that life begins at conception. Intervenors assert that, to the contrary, the sections merely require that physicians notify their patients that they are prescribing abortifacients, and not that the abor-

tifacients will kill their patients' unborn children. This assertion ignores both the State's definition of abortifacient, in which the State refers to "fetal death," and the State's definition of "fetus," which this court previously has described. However physicians choose to comply with the mandate of section 11(d), they nevertheless must notify their patients that the drug or device which they have prescribed will terminate the life of any fetus which their patients might be carrying. This section not only intrudes upon the medical discretion of the attending physician, but it also impermissibly imposes the State's theory of when life begins upon the physician's patient.

The State cannot justify this intrusion upon the physician-patient relationship by its interest in pro-

tecting maternal health or by its interest in preserving fetal life. The State's interest in protecting maternal emotional and physical health cannot justify sections 2(10) and 11(d) because the sections foist upon those women who prefer abortifacient methods of birth control the State's theory that abortifacients cause the death of unborn children. The State may not treat such women inequitably in order to protect the emotional health of women who oppose abortifacients. Likewise, the State's interest in preserving fetal life cannot justify sections 2(10) and 11(d) for two reasons. First, the sections operate in situations where the woman is not even pregnant. Second, when the woman is indeed pregnant, sections 2(10) and 11(d) impermissibly restrict the attending physician's discretion at a stage in the

mother's pregnancy at which neither of the State's recognized interests may be compelling. These sections additionally infringe upon a woman's constitutionally protected right of private decision-making in matters relating to contraception, with no countervailing State compelling interest. See Carey v. Population Services International, 431 U.S. at 688-89, 97 S.Ct. at 2017-18. As a result, sections 2(10) and 11(d) are unconstitutional.

IV. EXCLUSION OF EXHIBIT 2

Defendants and intervening defendants contend that the trial court improperly prevented them from demonstrating the existence of such a compelling State interest by the court's exclusion of intervening defendants' Exhibit 2. Exhibit 2 contained excerpts from a Chicago Sun-Times investigative series

entitled The Abortion Profiteers. Intervening defendants offered the excerpts in order to prove that the State had reason to fear that doctors in abortion clinics were not acting in their patients' best interests. In particular, intervening defendants sought to prove, by introduction of the excerpts, that doctors in abortion clinics commonly mislead their patients by trivializing the effects of an abortion. Intervening defendants also sought to prove that physicians in such clinics are primarily interested in their own monetary profit to the detriment of their patients' peace of mind. Intervening defendants contend that such abuses by doctors in abortion clinics justify the intrusion upon the physician-patient relationship presented by sections 2(10) and 11(d).

The district court excluded the

excerpts, noting that proof of the State's interest could not be made by means of a newspaper series. The court preferred evidence of a more factual nature, and, therefore, required the State to prove the need of sections 2(10) and 11(d) by evidence other than Exhibit 2.

Intervening defendants suggest that the district court thereby erroneously subjected Exhibit 2 to the requirements governing the introduction of adjudicative facts. Intervenors assert that the exhibit contained legislative facts, which need not be indisputable in order for a federal court to admit them into evidence. Intervenors assert that the court below should have considered the legislative facts reflected in their newspaper excerpts so that the court could evaluate properly the constitution-

ality of the two sections.

This court need not characterize t facts reported in the newspaper excerp as legislative or adjudictive facts order to review the district court' exclusion of the excerpts from evidence This court finds the excerpts simpl irrelevant to the constitutionality o Sections 2(10) and 11(d). The excerpt prove that certain doctors trivializ abortions and prefer monetary gain t preservation of their patients peace o mind. The excerpts do not prove that Illinois doctors misrepresent the nature of birth control methods which they prescribe for their patients or that Illinois doctors force women opposed to abortifacients to use them. The excerpts reveal no compelling State interest which justifies interference with a physician's medical discretion in consulting with his

patient about birth control. Moreover, the excerpts reveal no compelling interest which justifies an attempt by the State to foist upon any woman its theory of life. Whether the facts reported in the Sun-Times series are legislative or adjudicative in nature, this court finds them irrelevant to a constitutional analysis of sections 2(10) and 11(d).

Furthermore, this court acknowledges the substantial discretion of a trial judge in ruling on the relevancy of tendered evidence. This court consistently has accorded great deference to the evidentiary decisions of a trial court. United States v. Bouye, 688 F.2d 471, 476 (7th Cir. 1982). See also Gorby v. Schneider Tank Lines, Inc., 741 F.2d 1015, 1018 (7th Cir. 1984); United States v. Green, 735 F.2d 1018, 1026 (7th Cir.

1984); United States v. Sweeney, 688 F.2d 1131, 1144 (7th Cir. 1982). This court will not overturn such an evidentiary decision by a trial judge in the absence of a clear abuse of discretion. Gorby v. Schneider Tank Lines, Inc., 741 F.2d at 1018. This court finds no such clear abuse of discretion here. Thus, we defer to the district court's refusal to admit intervenors' Exhibit 2 into evidence.

V. CONCLUSION

The district court found sections 6(4), 2(10) and 11(d) of S.B. 47 unconstitutional and, accordingly, entered a permanent injunction against the enforcement of these sections. This court agrees that the above sections unconstitutionally infringe upon a woman's fundamental privacy right. This court, furthermore, finds section 6(1) of

S.B. 47 unconstitutional for the same reason. We therefore AFFIRM the district court's permanent injunction against sections 6(4), 2(10) and 11(d) and REVERSE the district court's judgment with respect to section 6(1). We direct the district court to enter a permanent injunction against the enforcement of section 6(1) on remand.

JUDGMENT--ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

November 30, 1984

Before
Hon. Harlington Wood, Jr. Circuit Judge
Hon. Wilbur Pell, Jr., Sr. Circuit Judge
Hon. William Campbell, Sr. District Judge*

Nos. 83-3175, 83-3176, 83-3177, 83-3253

ALLAN G. CHARLES, M.D., et al.,
Plaintiffs-Appellees/Cross-Appellants,
v.
RICHARD M. DALEY, et al.,
Defendants/Appellants/Cross-Appellees,
EUGENE F. DIAMOND, M.D., et al.,
Intervening Defendants-Appellants/
Cross-Appellees.

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,
Plaintiffs-Appellees,
v.
RICHARD M. DALEY, et al.,
Defendants-Appellants,
EUGENE F. DIAMOND, MD., et al.,
Intervening Defendants-Appellants

Appeals from the United States District
Court for the Northern District of
Illinios, Eastern Division

Nos. 79-C-4541, 79-C-4548
Charles Kocoras, Judge.

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* William J. Campbell, Senior District Judge for the Northern District of Illinois, sitting by designation.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part, REVERSED in part, with direction, in accordance with the opinion of this Court filed this date. Costs on appeal are to be assesed equally against defendants-appellants Richard M. Daley, et al. and intervening defendants-appellants Eugene F. Diamond, M.D., et al.

IN THE
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EUGENE F. DIAMOND, M.D., et al.,
Intervening Defendants-Appellants

Nos. 83-3175 to 83-3177 and 83-3253

NOTICE OF APPEAL

Notice is hereby given that Intervening Defendants-Appellants Eugene F.

Diamond, M.D., et al., appeal to the United States Supreme Court pursuant to 28 U.S.C. §1254(2) from those portions of the final judgment entered on November 30, 1984, in this action, declaring unconstitutional and permanently enjoining §§2(10), 6(1), 6(4) and 11(d) of the Illinois Abortion Law of 1975, as amended.

EUGENE F. DIAMOND, M.D.
JASPER F. WILLIAMS, M.D.

/s/

Maura K. Quinlan
One of Intervening
Defendants' Attorneys
Americans United for Life
Legal Defense Fund
230 N. Michigan Ave. #915
Chicago IL 60601
312/263-5029

CERTIFICATE OF SERVICE

I, Maura K. Quinlan, certify that a copy of Intervening Defendants-Appellants Notice of Appeal was served upon each of the following persons:

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of ACLU, Inc.
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by depositing a properly addressed copy with sufficient first class postage affixed in the U. S. mail on February 28, 1985, at 5:00 p.m.

/s/
Maura K. Quinlan

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE CONSTITUTION

U.S. Const. amend. XIV, §1 (in pertinent part):

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ADDITIONAL STATUTORY AND REGULATORY PROVISIONS

Ill. Rev. Stat. ch. 38, ¶81-22, §2(10):

> "Abortifacient" means any instrument, medicine, drug, or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed.

Ill. Rev. Stat. ch. 38, ¶81-26(1), §6(1):

> No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such

person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable before or after birth commits a Class 2 felony if the death of a viable fetus or infant results from such failure.

Ill. H.B. 1399, §6(1) (enacted June 30, 1984):

(a) Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb with or without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus.

(b) The physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Act, the available methods considered and the reasons for choosing the method employed.

(c) Any physician who intentionally knowingly, or recklessly violates the provisions of Section

6(1)(a) commits a Class 3 felony.

Ill. Rev. Stat. ch. 38, ¶81-26(4), §6(4):

> No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life or health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him a possibility known to him of sustained survival of the fetus apart from the body of the mother with or without artificial support. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of such a fetus before or after birth is guilty of a Class 3 felony if the death of a viable fetus or an infant results from such failure.

Ill. H.B. 1399, §6(4) (enacted June 30, 1984):

> (a) Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before

him, there is a reasonable possibility of sustained survival of the fetus outside the womb, with or without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus.

(b) The physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Act, the available methods considered and the reasons for choosing the method employed.

(c) Any physician who intentionally, knowingly, or recklessly violates the provisions of Section 6(4)(a) commits a Class 3 felony.

Ill. Rev. Stat. ch. 38, ¶81-31, §11(d):

Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for which it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor.

Ill. Rev. Stat. ch. 38, ¶81-22(9) (1983):

> "Fetus" and "unborn child" each mean a human being from fertilization until birth.

Ill. Rev. Stat. ch. 38, ¶81-22(6) (1984 Supp.):

> "Fetus" and "unborn child" each mean an individual organism of the species homo sapiens from fertilization until live birth.

Ill. Rev. Stat. ch. 38, ¶81-26(5) (1983):

> Nothing in Section 6 requires a physician to employ a method of abortion which, in the medical judgment of the physician performing the abortion based on the particular facts of the case before him, would increase medical risk to the mother.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Allan G. Charles, M.D., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4541
BERNARD CAREY, et al.,	)	
Defendants.	)	
THE HOPE CLINIC FOR WOMEN, Ltd., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4548
TYRONE C. FAHNER, et al.,	)	Judge Charles P. Kocoras
Defendants.	)	

AFFIDAVIT OF DIANA SHARK

I, Dianna Shark, a resident of the State of Illinois, having been first duly sworn, state that if called upon to testify in this case, I would testify as follows:

1. I am 33 years old and believe in family planning.

2. I also believe that there is a big difference between drugs or devices which act to prevent conception/fertilization and those which terminate a pregnancy after that point in time. I say this because I believe that a human being exists from the point of conception forward. I believe that any drug or device which prevents childbirth after the point of conception acts as an abortifacient and ends the life of a human being.

3. I, therefore, would not want to use an abortifacient. Information concerning the abortifacient character of any prescription should be required so that I can exercise my right to choose between abortifacients and other methods of family planning.

Respectfully submitted,

/s/
Dianna Shark

[Notarized 6/13/82]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Allan G. Charles, M.D., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4541
BERNARD CAREY, et al.,	)	
Defendants.	)	
THE HOPE CLINIC FOR WOMEN, Ltd., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4548
TYRONE C. FAHNER, et al.,	)	Judge Charles P. Kocoras
Defendants.	)	

AFFIDAVIT OF MARY CHRISTINE GASPAR

I, Mary Christine Gaspar, a resident of the State of Illinois, having been first duly sworn, state that if called upon to testify in this case, I would testify as follows:

1. I am of childbearing age.

2. I am of the opinion that an

individual human being exists from conception until death. I also believe that it is morally wrong to end the life of an innocent human being no matter how young it is.

3. I do not, however, think that family planning through the use of contraceptives is inappropriate since it does not terminate the life of a human being. It merely prevents that life from beginning.

4. Because of my beliefs and my desire to plan my family in a manner which would not conflict with those beliefs, I feel that it is necessary to know the effect of drugs or instruments which are commonly used for family planning. This would enable me to choose between those which act only as contraceptives and those which act as abortifacients.

5. Therefore, I think that it is imperative that anyone prescribing an abortifacient inform me of its abortifacient nature.

Respectfully submitted,

/s/
Mary Christine Gaspar

[Notarized 6/13/82]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Allan G. Charles, M.D., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4541
BERNARD CAREY, et al.,	)	
Defendants.	)	
THE HOPE CLINIC FOR WOMEN, Ltd., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4548
TYRONE C. FAHNER, et al.,	)	Judge Charles P. Kocoras
Defendants.	)	

AFFIDAVIT OF DEBRA ELROD EVANS

I, Debra Elrod Evans, a resident of the State of Illinois, having been first duly sworn, state that if called upon to testify in this case, I would testify as follows:

1. I am 29 years old.

2. I am not opposed to taking con-

traceptives as a means of family planning.

3. Because I believe that life begins at conception and that it is morally wrong to end a life, I would not knowingly use any instrument or drug which is known to cause the death of a fertilized egg--either through direct action on that egg or through prevention of its implantation.

4. I would expect any person prescribing an instrument or drug which acts to cause the death of a fertilized egg to inform me of its abortifacient nature. Without such information, I would not be able to exercise my choice of family planning according to my beliefs as set forth above.

Respectfully submitted,

/s/

Debra Elrod Evans

[Notarized 6/13/82]